

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN ANTHONY NICHOLAS,

Defendant-Appellant.

UNPUBLISHED

April 22, 2014

No. 314473

Macomb Circuit Court

LC No. 2012-000786-FH

Before: BORRELLO, P.J., and WHITBECK and K. F. KELLY, JJ.

PER CURIAM.

Defendant, John Anthony Nicholas, appeals as of right his conviction, following a jury trial, of assault with a dangerous weapon.¹ The trial court sentenced Nicholas as a fourth-offense habitual offender² to serve 1 1/2 to 15 years' imprisonment. We affirm.

I. FACTS

A. BACKGROUND FACTS

Shina Battisti testified that, on September 29, 2011, she had recently ended her relationship with Nicholas. According to Battisti, Paul Loren drove her to Nicholas's condominium to retrieve some personal belongings. Loren testified that he had had one drink of whiskey with lemon, honey, and tea, and a prescribed painkiller. Battisti testified that Nicholas was not home when she entered the condominium.

Loren testified that he waited outside while Battisti went into Nicholas's condominium. According to Loren, while he was waiting, he saw a white pickup truck park. Three men left the truck and ran to the condominium. Battisti testified that Nicholas arrived while she was inside the condominium, and they began arguing. According to Battisti, Loren knocked on the door while she and Nicholas were arguing. Nicholas opened the door and Loren yelled for her to leave the apartment with him. Nicholas then shut the door.

¹ MCL 750.82.

² MCL 769.12.

Loren testified that after Nicholas shut the door, he walked away from the condominium and approached a neighbor, Greg Dombrowski. Dombrowski testified that what Loren told him made him concerned for Battisti's safety, and he went into his home and told his mother to call the police. Dombrowski then went back outside.

According to Battisti, she refused to leave Nicholas's condominium because she was upset. Battisti testified that she grabbed Nicholas by the wrist, and he pushed her out of the way to go outside. Battisti testified that Nicholas left the condominium with a small baseball bat. Loren testified that he was walking around the condominium complex when Nicholas approached him and hit him with a youth baseball bat.

Loren testified that Nicholas began running, and Loren chased him. According to Loren, Nicholas got inside a white pickup truck. Loren hit the front of the truck with a brick or a hammer. Loren testified that he could not clearly remember what happened after that, but he remembered that Nicholas hit him with the truck and he was on the ground. Dombrowski testified that he saw the white pickup truck back out of a parking space, then it drove forward and swerve to hit Loren, who was standing to the side. Detective Modrzejewski testified that Nicholas told her that he struck Loren when he was backing out, and that he did not mean to hit Loren.

Detective Natalie Modrzejewski testified that, when she later interviewed Loren at the hospital, Loren told her that he was assaulted with a baseball bat and vehicle. Detective Modrzejewski testified that Nicholas told her that he picked up a baseball bat outside. Detective Modrzejewski testified that Nicholas told her that Loren drew a hammer and swung at Nicholas, who responded by hitting him with the baseball bat.

B. PROCEDURAL HISTORY

At the close of the prosecutor's case in chief, Nicholas moved for a directed verdict on charges of domestic violence and assault with a dangerous weapon. The trial court granted Nicholas's motion on the domestic violence charge, but denied his motion on the assault with a dangerous weapon charge. The jury ultimately found Nicholas guilty of assault with a dangerous weapon.

II. HEARSAY

A. STANDARD OF REVIEW

Generally, this Court reviews for an abuse of discretion preserved challenges to the trial court's evidentiary rulings and reviews de novo the preliminary questions of law surrounding the

admission of evidence.³ We also review de novo constitutional issues concerning the admission of evidence.⁴

But we review unpreserved issues for plain error affecting a party's substantial rights.⁵ An error is plain if it is clear or obvious, and the error affected the defendant's substantial rights if it affected the outcome of the lower court proceedings.⁶

B. LEGAL STANDARDS

Hearsay is "a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."⁷ Hearsay is generally inadmissible, unless it is subject to a hearsay exception.⁸ The improper admission of hearsay may implicate the defendant's state and federal constitutional rights.⁹

C. APPLYING THE STANDARDS

Nicholas contends that Detective Modrzejewski's testimony included inadmissible hearsay whose admission was also unfairly prejudicial. We disagree.

Detective Modrzejewski testified as follows:

Q. So, what did Mr. Loren tell you happened?

A. He explained that on the night of the incident he and [Battisti] went to [Nicholas's] residence so [Battisti] could recover some of her belongings that were inside. He said they drove together, parked outside near the garage area and she went inside the residence to gather her stuff.

Q. Did he ever tell you he was assaulted?

A. Yes, he did.

Q. With what?

³ *People v Layher*, 464 Mich 756, 761; 631 NW2d 281 (2001).

⁴ *People v Duncan*, 494 Mich 713, 723; 835 NW2d 399 (2013).

⁵ *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

⁶ *Id.*

⁷ MRE 801(c).

⁸ MRE 802; *Duncan*, 494 Mich at 724.

⁹ US Const, Am VI; Const 1963, art 1, § 20; *People v Dendel (On Second Remand)*, 289 Mich App 445, 452-453; 797 NW2d 645 (2010). See *Crawford v Washington*, 541 US 36, 50-51; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

A. A baseball bat and vehicle.

We conclude that Nicholas has not established that the admission of Detective Modrzejewski's testimony prejudiced him. An error affected the defendant's substantial rights if it affected the outcome of the lower court proceedings.¹⁰ The erroneous admission of hearsay evidence is harmless error when it is cumulative to other, proper testimony.¹¹ Here, Detective Modrzejewski's hearsay testimony was merely cumulative to Loren's earlier testimony regarding the assault. Nicholas had the opportunity to cross-examine Loren about his testimony. Therefore, the error was harmless and did not affect the outcome of Nicholas's trial. We conclude that Nicholas has not shown plain error because the hearsay testimony did not affect the outcome of his proceedings.

Nicholas also contends that Detective Modrzejewski's testimony was irrelevant because it was unfairly prejudicial under MRE 403's balancing test. We disagree.

We note that it is particularly important that the appellant preserve challenges to the relevance of evidence on the grounds of its prejudicial effect, because the trial court has the best opportunity to contemporaneously assess the relative weight of the evidence's probative value and prejudicial effect.¹² Unfair prejudice occurs if the use of evidence would be inequitable or if there is a danger that the jury will give it undue or preemptive weight.¹³

We conclude that Nicholas has not established that the trial court plainly erred by admitting Detective Modrzejewski's testimony without conducting a MRE 403 balancing test. Here, there is no indication in the record that the jury would have given Detective Modrzejewski's testimony undue or preemptive weight. Further, for the reasons stated above, this testimony was cumulative to properly admitted testimony, and therefore it was not prejudicial under the plain error test.

III. DIRECTED VERDICT ON ASSAULT WITH A DEADLY WEAPON

A. STANDARD OF REVIEW

In reviewing the trial court's decision on a motion for a directed verdict, this Court "consider[s] in the light most favorable to the prosecutor the evidence presented by the prosecutor up to the time the motion is made and determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt."¹⁴

¹⁰ *Carines*, 460 Mich at 763.

¹¹ *People v Hill*, 257 Mich App 126, 140; 667 NW2d 78 (2003).

¹² *People v Blackston*, 481 Mich 451, 462; 751 NW2d 408 (2008).

¹³ *Id.*

¹⁴ *People v Schultz*, 246 Mich App 695, 702; 635 NW2d 491 (2001). See *In re Winship*, 397 US 358, 364; 90 S Ct 1068; 25 L Ed 2d 368 (1970).

B. LEGAL STANDARDS

A defendant “who has not or is not engaged in the commission of a crime at the time he or she uses force other than deadly force may use force other than deadly force against another individual . . . if he or she honestly and reasonably believes that the use of force is necessary to defend himself or herself . . . from the imminent use of force by another individual.”¹⁵ “[A]n act . . . in which the defendant was the initial aggressor does not meet the elements of lawful self-defense.”¹⁶

C. APPLYING THE STANDARDS

Nicholas contends that he was entitled to a directed verdict on the charge of assault with a deadly weapon because he acted in self defense. Nicholas bases his argument on the contention that a juror could conclude that Loren was the aggressor. Nicholas misapprehends the standard of review. Viewing the evidence in the light most favorable to the prosecutor, a reasonable juror could conclude that Nicholas was not acting in self defense.

Here, Battisti testified that Loren knocked on the door and Nicholas shut the door in his face. Battisti testified that she then grabbed Nicholas, but Nicholas pushed past her so that he could go outside. Loren testified that Nicholas came at him as he was walking around the condominium complex and struck him with a baseball bat. Loren testified that he was unarmed at that time.

A reasonable juror could conclude from the evidence that Nicholas chased down Loren, who was unarmed, and struck him while he was outside Nicholas’s home. Therefore, Nicholas was not entitled to a directed verdict on the grounds of self defense.

IV. SENTENCING

A. STANDARD OF REVIEW AND ISSUE PRESERVATION

Generally, this Court reviews unpreserved constitutional issues for plain error affecting the defendant’s substantial rights.¹⁷ However, MCL 769.34(10) provides that

[i]f a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant’s sentence. A party shall not raise on appeal an issue challenging the scoring of the sentencing guidelines or

¹⁵ MCL 780.972(2).

¹⁶ *People v Heflin*, 434 Mich 482, 509; 456 NW2d 10 (1990). See *People v Riddle*, 467 Mich 116, 120 n 8; 649 NW2d 30 (2002).

¹⁷ *Carines*, 460 Mich at 764.

challenging the accuracy of information relied upon in determining a sentence that is within the appropriate guidelines sentence range unless the party has raised the issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the court of appeals.

B. APPLYING THE STANDARDS

Nicholas contends that his sentence was unconstitutional because the trial court (1) failed to consider mitigating evidence, and (2) did not state that the sentence was proportionate. Nicholas did not raise this issue below, and his sentence was within the guidelines range. Therefore, this Court may not consider this issue on appeal, and we decline to do so.

Even were we to consider Nicholas's contentions, we would conclude that they are without merit. We note that "the sentencing guidelines themselves . . . empower[] the trial court to consider virtually *any* factor that meets the substantial and compelling standard."¹⁸ Further, the Legislature has subscribed to the principle of proportionality as enshrined in the Michigan and United States constitutions when it fashioned the sentencing guidelines.¹⁹ Accordingly, this Court presumes that sentences within the guidelines range are proportionate.²⁰ Therefore, nothing prevented the trial court from considering mitigating factors and nothing required the trial court to state on the record that Nicholas's sentence was proportionate.

Nicholas also contends that his sentence was based on inaccurate and incomplete information. Courts presume that the defendant's pre-sentence investigation report is accurate unless the defendant challenges it.²¹ Again, Nicholas has not raised this contention at sentencing, in a proper motion for resentencing, or in a proper motion to remand. We conclude that we may not address this argument.²²

V. INEFFECTIVE ASSISTANCE

A. STANDARD OF REVIEW AND ISSUE PRESERVATION

Generally, a defendant's ineffective assistance of counsel claim "is a mixed question of fact and constitutional law."²³ When reviewing an ineffective assistance of counsel claim, this

¹⁸ *People v Claypool*, 470 Mich 715, 730; 684 NW2d 278 (2004). See *People v Osby*, 291 Mich App 412, 416; 804 NW2d 903 (2011) (which mitigating factors to consider is within the trial court's discretion).

¹⁹ *People v Babcock*, 469 Mich 247, 262-263; 666 NW2d 231 (2003).

²⁰ *People v Armisted*, 295 Mich App 32, 51; 811 NW2d 47 (2011).

²¹ *People v Lloyd*, 284 Mich App 703, 705; 774 NW2d 347 (2009).

²² See MCL 769.34(10).

²³ *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

Court reviews for clear error the trial court's findings of fact, and reviews de novo questions of law.²⁴

However, a defendant must move the trial court for a new trial or evidentiary hearing to preserve the defendant's claim that his or her counsel was ineffective.²⁵ When the trial court has not conducted a hearing to determine whether a defendant's counsel was ineffective, our review is limited to mistakes apparent from the record.²⁶ Here, Nicholas has not moved for an evidentiary hearing. Thus, our review is limited to mistakes apparent from the record.

B. LEGAL STANDARDS

A criminal defendant has the fundamental right to effective assistance of counsel.²⁷ To prove that his defense counsel was not effective, the defendant must show that (1) defense counsel's performance fell below an objective standard of reasonableness, and (2) there is a reasonable probability that counsel's deficient performance prejudiced the defendant.²⁸

C. HEARSAY TESTIMONY

Nicholas contends that defense counsel was ineffective when he failed to challenge Detective Modrzejewski's hearsay testimony. We disagree.

To prove ineffective assistance of counsel, the defendant must overcome the strong presumption that defense counsel's performance constituted sound trial strategy.²⁹ This Court will not substitute its judgment for that of defense counsel, or review this issue with the benefit of hindsight.³⁰ We give defense counsel broad discretion in matters of trial strategy because

²⁴ *Id.*

²⁵ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Unger*, 278 Mich App 210, 242; 749 NW2d 272 (2008).

²⁶ *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003).

²⁷ US Const, Am VI; Const 1963, art 1, § 20; *United States v Cronin*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984).

²⁸ *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

²⁹ *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997); *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007).

³⁰ *Odom*, 276 Mich App at 415.

counsel may be required to take calculated risks to win a case.³¹ “[T]here are times when it is better not to object and draw attention to an improper comment.”³²

As discussed above, Detective Modrzejewski’s hearsay testimony regarding what Loren told her transpired was cumulative to Loren’s testimony of the events. Given the cumulative nature of Detective Modrzejewski’s testimony (1) defense counsel may have reasonably decided not to draw attention to the testimony by objecting to it, and (2) there is no reasonable probability defense counsel’s failure to challenge this testimony prejudiced Nicholas.

We conclude that counsel was not ineffective for failing to challenge Detective Modrzejewski’s hearsay testimony.

D. SENTENCING

Nicholas contends that defense counsel was ineffective at sentencing when he failed to challenge Nicholas’s sentence as unconstitutional. We disagree.

As discussed above, Michigan’s sentencing scheme does not prevent the trial court from considering mitigating factors.³³ Further, Michigan’s Legislature has enshrined proportionality into the sentencing guidelines.³⁴ Therefore, defense counsel’s decision not to raise these meritless constitutional arguments before the trial court was reasonable. Further, Nicholas was not prejudiced because he was not entitled to relief on these grounds. Thus, we conclude that Nicholas’s counsel provided him with effective assistance.

VI. CONCLUSION

We conclude that the admission of Detective Modrzejewski’s hearsay testimony was not plain error because it did not prejudice Nicholas. We conclude that the trial court did not improperly deny Nicholas’s motion for a direct verdict. We also conclude that we may not review Nicholas’s sentencing challenges because he did not properly raise those challenges. Finally, we conclude that Nicholas’s counsel provided effective assistance.

We affirm.

/s/ Stephen L. Borrello
/s/ William C. Whitbeck
/s/ Kirsten Frank Kelly

³¹ *Pickens*, 446 Mich at 325.

³² *People v Unger*, 278 Mich App at 242, quoting *People v Bahoda*, 448 Mich 261, 287 n 54; 531 NW2d 659 (1995).

³³ See *Claypool*, 470 Mich at 730.

³⁴ *Babcock*, 469 Mich at 262-263.